No. 15659

United States
COURT OF APPEALS
for the Ninth Circuit

THE OCEANIC STEAMSHIP COMPANY,
Appellant,

vs.

INDEPENDENT STEVEDORE COMPANY, a corporation, and PORTLAND STEVEDORING COMPANY, a corporation,
Appellees.

APPELLANT'S CLOSING BRIEF

Appeal from the Judgment of the United States District Court for the District of Oregon.

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The casual overconfidence apparent in appellees' brief arises mainly from a disregard of these fundamental principles of the governing cases:

(1) An action for indemnity is not an action for contribution.

(2) Indemnity may be founded upon provisions implied from a contract as well as those expressed.

(3) An active fort-feasor may be compelled to indemnify a passive one, without an express contract for indemnity.

Appellees have also failed to evaluate the facts, relying on generalities without particularizing the specific proof which is supposed to support the findings below.

FACTS

Appellees labor under some misconceptions as to what facts are decisive. It is argued that Oceanic knew of the dangerous condition created by Independent. Although the evidence on the point is speculative, whether Oceanic had knowledge of the dangerous condition is unimportant. It is not a deciding factor in the case under any circumstances. An argument concerning that matter is a diversionary tactic to draw the Court's attention away from the decisive elements of the case. The only knowledge on the part of any party material to the case is the knowledge of both Independent and Portland of the existence of a dangerous condition. Knowledge on the part of the stevedores is a prerequisite for the imposition of liability upon them under *American President Lines v. Marine Terminals,* 234 F. 2d 753 (CA 9, 1956), cert. den. 352 U.S. 926. That knowledge is conclusively proved by the evidence in this case. The failure of the Trial Court to make a specific finding in that regard is one of the errors in the findings.

In addition to apodeictical proof of knowledge on the part of Independent and Portland of the danger in-

volving the hatch covers and the protruding hatch beam, the proof is also conclusive that Independent had the authority, the equipment and the manpower to have avoided the improper placement of the hatch beam originally. Likewise, Portland had the authority, the equipment and the manpower to correct the condition by flooring off the square of the hatch without subjecting Swanson to the risk involved in walking upon hatch covers in an unfilled row during the process of switching the No. 1 and No. 7 beams.

It is also beyond dispute that the procedure used by Portland in removing hatch covers and exchanging the strongbacks instead of merely flooring off the square of the hatch was done without the knowledge or consent of Oceanic. Oceanic's employee merely advised Portland's walking boss where he could get lumber. The lumber could and should have been used without removing any hatch covers.

The decision to undergo the risks of removing and replacing the hatch covers was solely that of Portland's employees, as is best illustrated by the testimony adduced by counsel for the appellees on cross-examination of Mr. Berg, Portland's walking boss:

"By Mr. Wood:

Q. I want to ask you a few questions, Mr. Berg. When the men refused to work there, wouldn't turn to, because of the dangerous condition of the hatch, was it on account of the bad condition of the hatchboards or the raised beam that they were afraid of?

A. It was both.

Q. Both of them?

A. Yes.

Q. When you found that they didn't want to

work under those conditions, you had a talk with the gang boss, Mr. Lundstrom [Portland's gang boss], did you?

A. Yes, sir.

Q. And you told him to floor up, cover the hatch up with lumber?

A. Right.

Q. You would go and get the lumber?

A. Yes.

Q. And you left it up to him to decide whether to change the beams or not?

A. Correct.

Q. Now, they could have floored up with lumber without changing the beams, as I understand it, but you thought it was better to change the beams first?

A. Right.

Q. Is that correct?

A. Correct." (Tr. 256-7)

Appellees have quoted the Trial Court's findings as though they settled all factual issues. This is error because the findings are not supported by substantial evidence. They are incomplete in many respects and erroneous in others, as shown in the opening brief. Appellees' selection is subject to the same faults.

Finding IX is erroneous because the work of replacing the hatch covers was not the routine work in the particular situation. It might be normal routine work where there is no dangerous condition, but the circumstances on the SS VENTURA made this something other than normal routine work. Those circumstances were that one beam was raised out of place and some hatch covers would rock slightly when stepped upon. They were unusual but there were ready means to overcome whatever risks were involved. If a feeling of in-

stability or danger resulted from stepping on a hatch cover which rocked slightly (but which could not slide when in a filled row) was obvious to Portland's employees before the work started, it was even more obvious that it would be dangerous to allow men to walk on such hatch covers in a partially filled row where an empty space would allow a hatch cover to slide. Reasonable men cannot differ on the proposition that Mr. Swanson could not have fallen through the hatch if no covers had been removed.

The Trial Court simply missed the point in assuming that work under these particular circumstances was normal and routine. If it had been normal and routine, the longshoremen would not have refused to proceed with the work. That fact alone disproves the finding. It was the careless manner in which the danger was corrected which caused injury. It is the same carelessness which entitles Oceanic to indemnity.

Finding X is misleading and erroneous because of its failure to state all of the material facts. It is true that Oceanic's supercargo cooperated by advising Portland's walking boss where lumber could be obtained, but that has nothing to do with what we have called the fateful decision: Portland's decision to remove hatch covers and exchange strongbacks. The lumber to which the walking boss was directed could and should have been used only to floor the area without making an opening through which a man could fall. Appellees reiterate on page 4 of their brief that the protruding strongback caused only a "slight rise," and from the testimony quoted above it is clear that the dangerous conditions

could have been corrected by flooring the square of the hatch with lumber without changing beams. Hence, the Trial Court was remiss in not stating the material fact that the decision to remove hatch covers and exchange the beams was exclusively that of Portland's employees and that Oceanic had no knowledge of it until after Swanson's accident.

Finding XI is erroneous. It is directly contrary to the explicit obligation of Independent as appears in its contract as follows:

> "The above rates will include the following services of the contractor:
>
> * * *
>
> (c) The removal and replacing of hatch covers, beams, strongbacks at hatches where any stevedoring is conducted;
>
> * * *
>
> *Responsibilities of the Parties.*
>
> * * * The contractor will be responsible for loss or damage to the ship, its equipment,and cargo, through or as a result of its negligence. * * *"

That Independent's acts were within the contemplation of the parties to the contract is obvious from the above. The causal connection of Independent's acts has been explained in our opening brief.

Finding XII is erroneous and contrary to the evidence. This is a key finding as to Portland, and its invalidity has been explained in our opening brief and in this one.

Finding XIII is erroneous and misleading. It does not take into account the fact that Portland's employees were fully aware of the defect in the hatch and had the

authority, the physical means and the opportunity to correct it. Portland had the duty of making the hatch a safe place in which to work, but, more important in this case, it also had the duty to use reasonable and safe means in performing the first duty. Portland breached the latter duty by using a negligent method of correcting the known defect. It could have stopped work and awaited further instructions, materials or assistance instead of plunging ahead without the knowledge of Oceanic. Swanson was not subjected to the risk of falling through the hatch until Portland carelessly made the opening and allowed or ordered him to walk on the hatch cover next to it.

Finding XIV is misleading because it does not take into account the fact that the condition of the hatch covers was not the proximate cause of injury to Swanson. The hatch covers constituted a passive condition upon which the active negligence of the stevedoring companies operated as a proximate cause of injury to Swanson.

Finding XV is wholly erroneous and unsupported by the evidence, as is fully explained in the opening brief and in this one.

APPELLEES' ARGUMENT

The argument concerning Portland will be considered first.

Appellees' discussion of the Portland contract is merely another example of the smoke-screen method of

argument. The specious suggestion that the principal obligation of Portland was to save time could result only from the assumption that this Court will not trouble itself to read the entire contract. The portions quoted in appellant's opening brief but ignored by the appellees clearly show that Portland made express promises to indemnify Oceanic for its negligence.

Appellees must be aware of *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956), but have neglected to concern themselves with any of the implied obligations imposed under its doctrine. Apparently appellees believe that if the recent developments of the law are ignored in their brief, this Court will accommodate them by doing likewise.

Perhaps appellees find the argument unanswerable that each of them had an obligation to perform services in a safe and workmanlike manner, whether or not the contract expressly imposed the obligation.

The attempt to distinguish the *American President Lines* case is without merit. This Court there held that a stevedore has the duty to correct a known defect by reasonable and safe means. In that case reasonable and safe means required the removal of defective strongbacks. In the present case Portland had the same duty to use reasonable and safe means to correct a known defect. Reasonable and safe means in this case required only the flooring over of the square of the hatch, not the make-work project of removing covers, exchanging beams and then replacing covers. Reasonable and safe measures did not require that procedure because the

known condition of the hatch covers would subject a man to an unnecessary risk in stepping upon a hatch cover which might rock under his foot and slide in an unfilled row.

The argument that it was proper to exchange hatch beams in this case because it was negligence not to remove one in the *American President Lines* case is, of course, absurd. The suggestion that exactly the same method of correction should be followed in each case is obviously groundless. This Court stated a legal principle in the *APL* case that it is the duty of the stevedore to use reasonable and safe means and to perform services in a workmanlike manner. In one case it may mean the removal of a hatch beam; in another case, where such removal subjects men to unnecessary risks, it means leaving the hatch beam in place and flooring it over with lumber. Appellees have confused the specific circumstance of one case with the principle of law which is applicable in all cases according to their circumstances.

Appellees have made the loose statement at the top of page 14 that Portland had the active consent and cooperation of the ship's supercargo. This is equally true and false, depending on what is referred to. It is true in that the supercargo impliedly consented to flooring the tweendeck by cooperating to the extent of advising the walking boss where lumber could be obtained. It is false, however, insofar as it refers to the principal issue of the case. Neither the supercargo nor any other employee of Oceanic knew of Portland's plan to exchange strongbacks and remove and replace the hatch covers,

and no employee of Oceanic gave any consent to that procedure. Opening part of the hatch created a risk which Oceanic did not cause, to which it gave no consent and of which it had no knowledge.

Appellees' argument as to Independent is concerned mainly with the issue of proximate cause. In reply to that we point out that Independent's negligence need not be the sole proximate cause. It was supplemented by the negligence of Portland. If Independent had not performed its work carelessly, there would have been no occasion for Portland to have engaged in the acts which caused injury to Swanson. It is suggested that Independent did not know what would happen in the next port, but it was not unlikely that the men would have to work in the tweendeck.

That Independent breached its contract and that it was careless cannot be gainsaid. No one can doubt for a second that the beam was not put into place properly and that it was Independent's employees who were at fault.

The argument that the consequences of Independent's negligent breach of contract cannot be the basis for indemnity has no merit. It would not have been made but for appellees' disregard of the *Ryan* and *American President Lines* decisions as well as the *Arrow** and *Rothschild*‡ cases.

**United States v. Arrow Stevedoring Co.*, 175 F. 2d 329 (CA 9, 1949), cert. den. 338 U.S. 904 (1949).

‡*United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (CA 9, 1950).

The reliance upon *Halcyon Lines, et al. v. Haenn Ship C. & R. Corp.*, 342 U.S. 282; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, and *American Mutual Liability Ins. Co. v. Matthews*, 182 F. 2d 322 (CA 2, 1950), is misplaced. It results from the failure to distinguish between contribution and indemnity. All those cases disallow claims for contribution. The *Halcyon* and *Hawn* cases don't even discuss the issue of indemnity. The *Matthews* case specifically holds that recovery can be had on a theory of contractual indemnity for failure to perform work properly. It anticipated the *Ryan* case in this regard and cited with approval *Rich v. United States*, 177 F. 2d 688 (CA 2, 1949), also cited in the opening brief. *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (CA 3, 1956), is explainable either as a case of concurrent active negligence by both the shipowner and the stevedore or else as an aberration which is not controlling here because it is contrary to the *American President Lines* case.

Appellees' studied indifference to the recent cases is inexplicable. Although most of them were referred to in the opening brief, only the *A.P.L.* case was given any consideration in the answering brief. The separate theory of liability, resting upon the decisions of this Court in *United States v. Arrow Stevedoring Co., supra,* and *United States v. Rothschild International Stevedoring Co., supra,* has been totally ignored.

It was expected that appellees would rely on *Amerocean S.S. Co. v. Copp,* 245 F. 2d 291, and *United States v. Harrison,* 245 F. 2d 911, both decided this year by

this Court. Since they did not, we merely mention that the cases do not change the principles we rely on and are distinguishable on their facts.

CONCLUSION

Inasmuch as there is a body of law governing actions such as this, whether or not the appellees wish to recognize its existence, that law must be applied. In essence it is that stevedoring contractors who create risks or who voluntarily and carelessly proceed with work in the presence of known risks are responsible for the consequences of their actions.

Responsibility entails the indemnification of a shipowner to the extent of damages, costs, interest and attorneys' fees which the shipowner has been compelled to pay to a stevedoring employee injured as a result of the carelessness of the stevedoring contractor. Unless the stevedoring contractor can show that the employees of the ship were active tort-feasors, vague references to mutual fault provide no defense.

This shipowner is not precluded from recovering simply because an unseaworthy condition existed or because of passive negligence or the furnishing of a condition. In any of those circumstances a stevedore whose employees are the active tort-feasors must indemnify the shipowner.

The injustice of the Trial Court's denial of indemnity is dramatized by posing the following questions:

(1) Would the accident to Swanson have happened if Independent had properly set the hatch beams?

(2) Would the accident have happened if Portland had simply floored over the square of the hatch instead of removing the covers, exchanging the beams and permitting Swanson to walk on a partially filled row of hatch covers which Portland's employees knew might rock and slide under his feet?

(3) If Independent had not improperly placed the beam, and if Portland had merely floored the area without carelessly allowing Swanson to walk on a partially filled row of hatch covers, could the condition of the hatch covers have caused the accident?

None of these questions can be answered in the affirmative. The findings of the Court in effect answered them all in the affirmative, but the evidence does not support the findings. The defects in some of the hatch covers were and would have remained innocuous if the active negligence of the two stevedoring contractors had not supervened. Therefore, either or both of them must indemnify Oceanic on the implied contract theory or the active-passive negligence theory.

Respectfully submitted,

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